

AP/402/2022

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTIONN B ENTERPRISE
VERSUS
INDIAN RAILWAYSBEFORE:
THE HON'BLE CHIEF JUSTICE PRAKASH SHRIVASTAVA
DATE : 8TH JULY, 2022APPEARANCE:
Mr. Biswarap Bhattacharya, Advocate
Mr. Arka Kumar Nag, Advocate
Mr. Rahul Kumar Singh, Advocate
....for the applicant

The Court:- The affidavit of service was earlier filed by the applicant disclosing service of notice to the respondent. Therefore, on the previous date, the case was adjourned awaiting appearance on behalf of the respondent.

Counsel for the applicant has pointed out that again notice through email has been served on the respondent. In spite of service of notice, no one is present.

This application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of the arbitrator.

Learned counsel for the applicant has pointed out that the agreement was entered into between the parties for the signaling work in connection with the stabling of 15 coaches EMU Rake and that the arbitration agreement for the same was executed on 13th June, 2017. The General Conditions of Contract contain the following arbitration clause:-

“ARBITRATION

- a) *In the event of any question, dispute or difference arising under this conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of a person appointed to be the arbitrator, by the General Manager/Chief Engineer/Chief Project Manager. It will be no objection if the arbitrator is a Government servant that he had to deal with matters to which the contract relates or that in the course of his*

duties as a Government servant he has expressed views on all any of the arbitration shall be final and binding on the parties to this contract.

- b) In the event of the arbitrator dying, neglecting or refusing to act, or resigning or being unable to act for any reason or his award is being set aside by the court of any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.*
- c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.*
- d) The arbitrator may from time to time with the consent of all the parties to the contract enlarge the time for making the award.*
- e) Upon every and any such reference, the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.*
- f) Subject as aforesaid the Arbitration Act, 1940 and the rules there under and any statutory modification thereof for the time being in force shall be deemed to apply to the arbitration proceeding under this clause.*
- g) Work under the contract shall, if reasonably possible continue during the arbitration proceedings and no payment due to or payable to by the Purchaser, shall be withheld on account of such proceedings.*
- h) The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator at his discretion may determine.*
- i) In this clause the authority to appoint the arbitrator includes if there be no such authority the officer who is for the time being discharging the functions of that authority whether in addition to other functions or otherwise.*

In this witness whereof the parties have to set and subscribe their respective hands and/or seals the day and year respectively mentioned against their respective signature. ”

Learned counsel for the applicant has also pointed out that the dispute had arisen, therefore, the applicant had sent the notice and the same was replied on 24th January, 2020 stating that the settlement in the matter with the department is going on and the appointment of arbitrator is not possible. Further case of the applicant is that under pressure, the subsidiary agreement dated 17th February, 2020 was got executed containing the clause that the arbitration clauses contained in the principal agreement are ceased to

have any effect and shall be deemed to be non-existence for all parties. He submits that the subsidiary agreement was executed by taking the signature of the applicant under pressure to release part of due amount and that the said agreement is not binding, therefore, applicant had again served the notice dated 06.8.2021 with a prayer for appointment of arbitrator in terms of the Act of 1996 but the same was declined by the reply dated 22nd March, 2022. In the aforesaid background, the prayer for appointment of arbitrator is made.

Since no one has entered appearance on behalf of the respondent, therefore, above contention of the applicant has remained uncontroverted. It is the specific case of the applicant before this Court that the claim of the applicant arises out of the principal agreement and that the subsidiary agreement being obtained under pressure will not come in the way of arbitration clause existing in the principal agreement. This aspect can very well be gone into by the arbitrator by giving the parties an opportunity to lead evidence. Hence, at this stage, I am of the opinion, a case for appointment of arbitrator is made out in view of the existence of the arbitration clause and existing dispute.

Accordingly, AP is allowed. Mr. Saptansu Basu, Senior Advocate (Mob.No.9830087914) is appointed as Arbitrator to resolve the dispute between the parties.

The appointment is subject to submission of declaration by the Arbitrator in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the Act before the Registrar, Original Side of this Court within four weeks from today.

Let this order be conveyed to the Arbitrator by the Registrar, Original Side forthwith.

AP is accordingly disposed of.

(PRAKASH SHRIVASTAVA, C.J.)